

1 **UNITED STATES DISTRICT COURT**
2 **DISTRICT OF NEVADA**

3 PAUL LOPEZ,

4 Plaintiff

5 v.

6 HOMAN, et. al.,

7 Defendants

Case No.: 3:19-cv-00098-RCJ-WGC

**Report & Recommendation of
United States Magistrate Judge**

Re: ECF No. 20

9 This Report and Recommendation is made to the Honorable Robert C. Jones, United
10 States District Judge. The action was referred to the undersigned Magistrate Judge pursuant to 28
11 U.S.C. § 636(b)(1)(B) and the Local Rules of Practice, LR 1B 1-4.

12 Before the court is a Motion for Partial Summary Judgment filed by some of the
13 defendants to this action: former Governor Brian Sandoval, Secretary of State Barbara K.
14 Cegavske, former Attorney General Adam P. Laxalt, Governor Steve Sisolak, and Attorney
15 General Aaron Ford, who are current or former members of the Board of Prison Commissioners.
16 (ECF Nos. 20, 20-1 to 20-5, errata at ECF Nos. 21, 21-1.) Plaintiff filed a response. (ECF Nos.
17 22, 22-1.) Defendants filed a reply. (ECF No. 23.)

18 After a thorough review, it is recommended that the motion be granted.

19 **I. BACKGROUND**

20 Plaintiff is an inmate in the custody of the Nevada Department of Corrections (NDOC),
21 proceeding with this action pursuant to 42 U.S.C. § 1983. He paid the full filing fee and is
22 represented by counsel. The events giving rise to this action took place while Plaintiff was
23 housed at Ely State Prison (ESP).

1 Plaintiff filed his complaint on February 20, 2019. (ECF No. 1.) The court initially stated
2 that it would not screen the case as Plaintiff was represented by counsel. (ECF No. 5.)
3 Defendants nevertheless filed a motion requesting that the court screen the complaint.
4 (ECF No. 6.) While the court does not view screening counseled cases to be an efficient use of
5 judicial resources because the concerns underlying screening pursuant to 28 U.S.C. § 1915A are
6 not typically present in counseled cases, the court nevertheless granted the motion because the
7 statute does not distinguish between cases filed by prisoners that are pro se or represented by
8 counsel.

9 Plaintiff's complaint alleges that an assault occurred at ESP on April 12, 2017, and two
10 prisoners were stabbed by other prisoners. They were transported to a local hospital and were
11 treated, and survived their injuries. Defendants Gittere and Homan were assigned to investigate.
12 On April 14, 2017, Plaintiff was placed in administrative segregation pending investigation of
13 the assaults. On April 19, 2017, Homan submitted a notice of charges (NOC) against Plaintiff for
14 murder (even though the two victims survived). The NOC did not allege Plaintiff was physically
15 involved or that either victim had died, but instead asserted that confidential information
16 indicated Plaintiff was the inmate who ordered the attacks on the two victims. Defendant
17 Manning served Plaintiff with the NOC for murder on May 1, 2017. Plaintiff entered a plea of
18 not guilty.

19 Plaintiff alleges that Manning knew neither victim died, but referred the matter for a
20 disciplinary hearing on the murder charge. On May 4, 2017, Plaintiff was placed on High Risk
21 Potential (HRP) status in the prison infirmary by defendant Filson based on the murder charge
22 even though he had not had a hearing or displayed behavior justifying the classification. He was
23 placed in a suicide-watch type cell, without windows, for nearly 24 hours a day; the lights were

1 on 24 hours a day, causing him sleep deprivation; he had to endure excessively loud noises from
2 behavior of mentally ill inmates being housed in the infirmary, which also caused him sleep
3 deprivation and psychological distress; and, he hardly received any outdoor recreation.

4 The disciplinary hearing took place on September 6, 2017. Defendant Bryant became the
5 charging officer, and Plaintiff was charged with murder, even though Bryant knew that no one
6 died from the assaults.

7 Defendant Huston was the disciplinary hearing officer. Plaintiff pled guilty again, and
8 requested witnesses (the two victims, the assailants, and staff associated with the matter). Huston
9 denied the victims as witnesses for unspecified security reasons even though their identities had
10 already been revealed to Plaintiff through the NOC. He denied the perpetrators as witnesses for
11 unspecified security reasons, even though the NOC alleged and intimated Plaintiff was already
12 associated with them for having ordered the assaults. In the hearing summary, Huston stated that
13 he spoke with the perpetrators, but did not indicate what he was told. Huston denied the staff
14 witnesses because he claimed Plaintiff did not give specific names; but, Huston stated in the
15 hearing summary that staff had submitted reports. Plaintiff was not privy to the reports and did
16 not know which staff had knowledge of the facts. Huston found Plaintiff guilty of the murder
17 charge even though there was no evidence to support the charge and he was not allowed to call
18 any witnesses. Huston sanctioned Plaintiff to 12 months in disciplinary segregation, restitution,
19 and referred him to the Attorney General's Office for criminal prosecution, but there was no
20 forfeiture of good time credits. Plaintiff alleges that if he had been allowed to call witnesses, they
21 would have testified that no murder occurred and he had nothing to do with ordering the assaults.

22 Plaintiff appealed the disciplinary conviction to defendant Filson at the first level. Filson
23 was aware no one died from the assaults, but denied the appeal.

1 Plaintiff filed a second level disciplinary appeal, but does not recall ever receiving a
2 response. He believes defendant Tristan denied the second level appeal even though Tristan
3 knew no one died.

4 Particularly relevant to the instant motion, Plaintiff alleges that there was a policy,
5 practice or custom of allowing prisoners to be charged and convicted of murder violations
6 despite no one having been killed, and that was promulgated, permitted and/or enforced by
7 defendants former Governor Sandoval, Secretary of State Cegavske, former Attorney General
8 Laxalt, Dzurenda, Tristan, Filson, Gittere, and Reubart, and this was the driving force behind
9 Plaintiff being convicted and sanctioned for murder even though no one had died. He further
10 avers that the newly elected prison commissioners, Governor Sisolak and Attorney General Ford,
11 joined in this policy, practice or custom.

12 On screening, the court allowed Plaintiff to proceed with these claims asserted in the
13 complaint: (1) a Fourteenth Amendment/Article 1, Section 8 of the Nevada Constitution due
14 process claim against Homan and Bryant based on allegations that they subjected him to a
15 murder charge that was unsupported by evidence; (2) a Fourteenth Amendment/Article 1,
16 Section 8 of the Nevada Constitution due process claim against Manning based on the allegation
17 that he served Plaintiff with the NOC for murder that was unsupported by evidence as he knew
18 that no one died; (3) a Fourteenth Amendment/Article 1, Section 8 of the Nevada Constitution
19 due process claim against Huston based on allegations that he found Plaintiff guilty of the
20 murder charge without any evidence and denied Plaintiff's request to call witnesses; (4) a
21 Fourteenth Amendment/ Article 1, Section 8 of the Nevada Constitution due process claim
22 against Filson based on allegations that he placed Plaintiff on HRP status for being charged with
23 murder when he knew the charge was devoid of evidence and that Plaintiff posed no physical

1 management problem to staff, resulting in confinement under harsh conditions; (5) an Eighth
2 Amendment/Article 1, Section 6 of the Nevada Constitution claim that Filson placed Plaintiff on
3 HRP status under the conditions described in the fourth cause of action (deprivation of exercise,
4 constant illumination, and with excessive noise) and that he was denied regular psychological
5 checkups while suffering psychologically when he was housed on HRP status; (6) a Fourteenth
6 Amendment/Article 1, Section 8 of the Nevada Constitution due process claim against Filson and
7 Tristan based on allegations that they denied his appeal when they knew the murder charge was
8 devoid of evidence because no one died; (7) a Fourteenth Amendment/Article 1, Section 8 of the
9 Nevada Constitution due process claim against former Governor Sandoval, Governor Sisolak,
10 Secretary of State Cegavske, former Attorney General Laxalt, Attorney General Ford, Dzurenda,
11 Tristan, Filson, Gittere and Reubart based on allegations that they promulgated, permitted or
12 enforced a policy, practice or custom of allowing prisoners to be charged, convicted, and
13 sanctioned for murder despite the fact that no one had died from inmate on inmate assaults, and
14 this was the driving force behind Plaintiff's conviction, sanction and placement on HRP status
15 under extreme conditions; (8) an Eighth Amendment/Article 1, Section 6 of the Nevada
16 Constitution claim against former Governor Sandoval, Governor Sisolak, Secretary of State
17 Cegavske, former Attorney General Laxalt, Attorney General Ford, Dzurenda, Tristan, Filson,
18 Gittere, and Reubart, based on allegations that these defendants violated his right against cruel
19 and unusual punishment when they promulgated, permitted or enforced this policy. (Screening
20 Order, ECF No. 14.) Thus, the action is proceeding against defendants: Ronald Bryant, Secretary
21 of State Barbara Cegavske, James Dzurenda, Timothy Filson, Attorney General Aaron Ford,
22 William Gittere, Dennis Homan, Robert Huston, Attorney General Adam Laxalt, Scott Manning,
23 William Reubart, Brian Sandoval, Steve Sisolak, and David Tristan.

1 On September 6, 2019, Defendants filed their answer. (ECF No. 19.) On the same date,
2 this motion for summary judgment was filed by former Governor Sandoval, Secretary of State
3 Cegavske, former Attorney General Laxalt, Governor Sisolak, and Attorney General Ford.
4 (ECF No. 20.) Only the seventh and eighth causes of action pertain to these defendants and are at
5 issue in this motion.

6 Preliminarily, the moving defendants assert that the charge of murder is classified as an
7 MJ 16 charge, under Administrative Regulation (AR) 702. They claim that the charge was
8 appropriate, even though the victims survived, because AR 702.02.5 defines the murder charge
9 as "the unlawful killing of another human being with malice aforethought, either express or
10 implied, *and all lesser included offenses*." They further argue: (1) Defendants, as members of the
11 Board of Prison Commissioners, have Eleventh Amendment immunity with respect to any
12 official capacity money damages claim Plaintiff brings against them as they are not persons that
13 may be sued under 42 U.S.C. § 1983; (2) Plaintiff does not seek injunctive relief and therefore
14 cannot proceed against these Defendants in their official capacities; (3) there are no facts to
15 establish the Defendants' personal participation in the alleged constitutional violations;
16 (4) Sandoval, Laxalt and Cegavske are entitled to qualified immunity and discretionary
17 immunity to the extent they are sued in their individual capacities; and (5) there are no facts to
18 establish liability on the part of these Defendants in the seventh and eighth causes of action
19 asserted against them.

20 Plaintiff argues: (1) as prison commissioners sued in their official capacities for
21 prospective relief (Cegavske, Ford and Sisolak) are not entitled to immunity from suit; (2) the
22 Defendants did personally participate in the alleged constitutional violation when they approved
23 the policy at issue, which is the moving force behind the alleged constitutional violations;

1 (3) Cegavske, Ford, and Sisolak are not entitled to qualified immunity; and (4) Defendants are
2 not entitled to summary judgment on the seventh and eighth causes of action because
3 constitutional violations did occur.

4 **II. LEGAL STANDARD**

5 The legal standard governing this motion is well settled: a party is entitled to summary
6 judgment when "the movant shows that there is no genuine issue as to any material fact and the
7 movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also Celotex Corp.*
8 *v. Cartrett*, 477 U.S. 317, 330 (1986) (citing Fed. R. Civ. P. 56(c)). An issue is "genuine" if the
9 evidence would permit a reasonable jury to return a verdict for the nonmoving party. *Anderson v.*
10 *Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). A fact is "material" if it could affect the outcome
11 of the case. *Id.* at 248 (disputes over facts that might affect the outcome will preclude summary
12 judgment, but factual disputes which are irrelevant or unnecessary are not considered). On the
13 other hand, where reasonable minds could differ on the material facts at issue, summary
14 judgment is not appropriate. *Anderson*, 477 U.S. at 250.

15 "The purpose of summary judgment is to avoid unnecessary trials when there is no
16 dispute as to the facts before the court." *Northwest Motorcycle Ass'n v. U.S. Dep't of Agric.*, 18
17 F.3d 1468, 1471 (9th Cir. 1994) (citation omitted); *see also Celotex*, 477 U.S. at 323-24 (purpose
18 of summary judgment is "to isolate and dispose of factually unsupported claims"); *Anderson*, 477
19 U.S. at 252 (purpose of summary judgment is to determine whether a case "is so one-sided that
20 one party must prevail as a matter of law"). In considering a motion for summary judgment, all
21 reasonable inferences are drawn in the light most favorable to the non-moving party. *In re*
22 *Slatkin*, 525 F.3d 805, 810 (9th Cir. 2008) (citation omitted); *Kaiser Cement Corp. v. Fischbach*
23 *& Moore Inc.*, 793 F.2d 1100, 1103 (9th Cir. 1986). That being said, "if the evidence of the

1 nonmoving party "is not significantly probative, summary judgment may be granted." *Anderson*,
2 477 U.S. at 249-250 (citations omitted). The court's function is not to weigh the evidence and
3 determine the truth or to make credibility determinations. *Celotex*, 477 U.S. at 249, 255;
4 *Anderson*, 477 U.S. at 249.

5 In deciding a motion for summary judgment, the court applies a burden-shifting analysis.
6 "When the party moving for summary judgment would bear the burden of proof at trial, 'it must
7 come forward with evidence which would entitle it to a directed verdict if the evidence went
8 uncontroverted at trial.' ... In such a case, the moving party has the initial burden of establishing
9 the absence of a genuine [dispute] of fact on each issue material to its case." *C.A.R. Transp.*
10 *Brokerage Co. v. Darden Rest., Inc.*, 213 F.3d 474, 480 (9th Cir. 2000) (internal citations
11 omitted). In contrast, when the nonmoving party bears the burden of proving the claim or
12 defense, the moving party can meet its burden in two ways: (1) by presenting evidence to negate
13 an essential element of the nonmoving party's case; or (2) by demonstrating that the nonmoving
14 party cannot establish an element essential to that party's case on which that party will have the
15 burden of proof at trial. *See Celotex Corp. v. Cartrett*, 477 U.S. 317, 323-25 (1986).

16 If the moving party satisfies its initial burden, the burden shifts to the opposing party to
17 establish that a genuine dispute exists as to a material fact. *See Matsushita Elec. Indus. Co. v.*
18 *Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). The opposing party need not establish a genuine
19 dispute of material fact conclusively in its favor. It is sufficient that "the claimed factual dispute
20 be shown to require a jury or judge to resolve the parties' differing versions of truth at trial."
21 *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987)
22 (quotation marks and citation omitted). The nonmoving party cannot avoid summary judgment
23 by relying solely on conclusory allegations that are unsupported by factual data. *Matsushita*, 475

1 U.S. at 587. Instead, the opposition must go beyond the assertions and allegations of the
2 pleadings and set forth specific facts by producing competent evidence that shows a genuine
3 dispute of material fact for trial. *Celotex*, 477 U.S. at 324.

4 **III. DISCUSSION**

5 **A. Official Capacity**

6 Governor Sisolak and Attorney General Ford are sued only in their official capacities.
7 Former Governor Sandoval, former Attorney General Laxalt, and Secretary of State Cegavske
8 are sued in their official and individual capacities.

9 Defendants argue that they are entitled to summary judgment insofar as they are sued in
10 their official capacities. The court finds, *infra*, that Defendants are entitled to summary judgment
11 because there is no evidence that they personally participated in the alleged constitutional
12 violations; however, the court will include a preliminary discussion regarding how these
13 Defendants may be sued and for what relief in their official versus individual capacities.

14 Defendants argue that the State is immune from suit under the Eleventh Amendment, and
15 the Board of State Prison Commissioners is a State agency with board members who are certain
16 elected officers of the State; therefore, Defendants argue that neither the Board nor its members
17 can be sued in their official capacity for money damages under section 1983.

18 Plaintiff states that he is not seeking monetary damages from Cegavske, Ford and Sisolak
19 in their official capacities. Instead, Plaintiff asserts that he seeks prospective relief; therefore, he
20 may proceed against Cegavske, Ford and Sisolak in their official capacities. The prospective
21 relief he seeks includes that the policy, practice or custom of allowing prisoners to be charged
22 and convicted of murder when no one has died by seeking a declaratory judgment finding that
23 the policy is unconstitutional as violative of the Fourteenth Amendment's Due Process Clause. In

1 addition, he seeks an injunction ordering Defendants to expunge the notice of charges and the
2 MJ:16 murder charge from his prison records.

3 The State and agencies that are an arm of the State are immune from suit and are not
4 persons who can be sued under Section 1983. *See Will v. Michigan Dep't of State Police*, 491
5 U.S. 58 (1989); U.S. Const. amend XI. Plaintiff has not sued the State or the Board of Prison
6 Commissioners, but only members of the Board of Prison Commissioners; therefore, they are not
7 entitled to summary judgment on this basis. A state official sued in his or her *official capacity*
8 for *monetary damages*, however, is not a person under Section 1983. *See Arizonans for Official*
9 *English v. Arizona*, 520 U.S. 43, 69 n. 24 (1997); *Will v. Mich. Dep't of State Police*, 491 U.S.
10 58, 71 (1981); *Flint v. Dennison*, 488 F.3d 816, 824-25 (9th Cir. 2007); *Doe v. Lawrence*
11 *Livermore Nat'l Lab.*, 131 F.3d 836, 839 (9th Cir. 1997). Therefore, Plaintiff cannot proceed
12 with his claims against these defendants in their *official capacity* for *monetary damages*.

13 Defendants acknowledge that state officials sued in their official capacity for *injunctive*
14 *relief* are considered persons for purposes of section 1993, because actions against them for
15 prospective relief are not treated as an action against the state. *See Will*, 491 U.S. at 71 n. 10;
16 *Hartmann v. Cal. Dep't of Corr. & Rehab.*, 707 F.3d 1114, 1127 (9th Cir. 2013). Defendants
17 argue, however, that Plaintiff has not and cannot seek injunctive relief against the board
18 members. Initially, they assert that Plaintiff is limited to seeking injunctive relief against the
19 current board members—Governor Sisolak, Attorney General Ford, and Secretary of State
20 Cegavske—and not the former board members—former Governor Sandoval and former Attorney
21 General Laxalt—who could not effectuate any injunctive relief. Then, Defendants contend that
22 Plaintiff's prayer for relief does not seek any injunctive relief against the board members, but
23

1 only compensatory damages, declaratory relief, punitive damages, interest, costs and attorney
2 fees, and "other and further relief as the Court deems just under the circumstances."

3 Defendants are correct, and Plaintiff appears to acknowledge¹, that Plaintiff cannot seek
4 prospective injunctive relief with respect to the *former* board members—former Governor
5 Sandoval and former Attorney General Laxalt—insofar as they are sued in their official capacity.
6 *See Hartmann v. Cal. Dep't of Corr. & Rehab.*, 707 F.3d 1114, 1127 (9th Cir. 2013) (citations
7 omitted) (plaintiff must identify law or policy challenged and "name the official within the entity
8 who can appropriately respond to injunctive relief").

9 At this point, Plaintiff is left with his *official capacity injunctive* relief claims against
10 Governor Sisolak, Attorney General Ford, and Secretary of State Cegavske, and his *individual*
11 *capacity monetary damages* claims against former Governor Sandoval, former Attorney General
12 Laxalt, and Secretary of State Cegavske.

13 The court must now consider whether Plaintiff can proceed with his *official capacity*
14 *injunctive* relief claims against Governor Sisolak, Attorney General Ford and Secretary of State
15 Cegavske. Again, official capacity actions for injunctive relief are not treated as an action against
16 the state itself. Moreover, the Ninth Circuit noted in *Jackson v. Hayakawa*, 682 F.3d 1344 (9th
17 Cir. 1982), that "[i]t has been clear since *Ex Parte Young*, 209 U.S. 123 (1908), that the Eleventh
18 Amendment does not bar actions against state officers in their official capacities if the plaintiffs
19 seek only *a declaratory judgment or injunctive relief*." *Jackson*, 682 F.3d at 1350 (citations
20 omitted, emphasis added).

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22
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¹ See argument at ECF No. 22 at 4-5, n. 1, 6, noting that current Board members consist of
Sisolak, Cegavske, and Ford.

1 Plaintiff asks for *declaratory relief* finding that the policy, practice or custom of allowing
2 prisoners to be charged, convicted, and sanctioned for murder violations despite the fact that no
3 one has died from alleged inmate on inmate assaults is unconstitutional. Therefore, he states
4 official capacity declaratory relief claims against Governor Sisolak, Attorney General Ford and
5 Secretary of State Cegavske.

6 Defendants further argue that any such relief would be directed to corrections staff, and
7 not to them, to have any impact. Plaintiff argues that under Nevada law, Cegavske, Ford and
8 Sisolak are prison officials in their capacity as members of the Board of Prison Commissioners
9 and are responsible for supervision of all matters connected with the state prison as may be
10 provided by law, citing Nevada Constitution, Article 5, Section 21 and Nevada Revised Statutes
11 209.101, 209.113, 209.361. Plaintiff asserts that because the Board is ultimately responsible for
12 the establishment of NDOC administrative policies, any change in policies and practices must be
13 approved by the Board to be given full force and effect.

14 The head of the NDOC is the Board of State Prison Commissioners. Nev. Rev. Stat.
15 209.101. The Board shall "[p]rescribe regulations for carrying on the business of the Board and
16 the [NDOC]." Nev. Rev. Stat. 209.111. The Director is responsible to the board. Nev. Rev. Stat.
17 209.121(2)(b). The Director is responsible for establishing regulations with the approval of the
18 Board. Nev. Rev. Stat. 209.131(6).

19 Assuming Plaintiff could establish that these Defendants were liable for the alleged
20 constitutional violations and Plaintiff was entitled to the declaratory relief sought, the Director of
21 NDOC would be responsible for promulgating any revision to the AR, and the Board Members
22 *would then need to approve amended AR 707*. Again, assuming there is a valid basis for liability
23 against them, they would be proper defendants for purposes of effectuating injunctive relief.

1 **B. Personal Participation**

2 Next, regardless of the capacity in which they are sued, Defendants argue that Plaintiff
3 cannot prove any set of facts showing that they personally participated in the alleged
4 constitutional violations.

5 Defendants argue that they were not involved in the investigation of the alleged charge,
6 they did not sit on the disciplinary review committee, they did not speak to any of the victims,
7 perpetrators or staff members, and did not review the grievances filed by Plaintiff relevant to the
8 disciplinary action. As such, they contend they had no personal participation in the alleged
9 constitutional violation. They assert that Plaintiff cannot provide any set of facts establishing the
10 personal involvement of the board members in any of the events that are the basis of this action;
11 therefore, they are entitled to summary judgment.

12 Plaintiff argues that supervisory liability exists even without overt personal participation
13 in the offensive act if the supervisory officials implement a policy so deficient that the policy
14 "itself is a repudiation of constitutional rights" and is "the moving force of the constitutional
15 violation." Plaintiff contends this is direct liability which allows an action against a supervisor as
16 long as there is sufficient causal connection. Plaintiff maintains that the board members
17 personally participated in the approval of the murder charge policy that Plaintiff challenges, and
18 that is a repudiation of his rights, and the moving force behind the alleged constitutional
19 violations.

20 In their reply, Defendants argue that to hold the board members liable, they must do more
21 than simply approve a regulation brought to them, arguing that deference must be given to the
22 judgment of prison authorities. They further argue that they are permitted to rely on the
23

1 Director's expertise, who drafts the ARs for the Board's consideration. Therefore, Defendants
2 contend they did not have any "culpable action" with respect to AR 707.

3 "Under section 1983, supervisory officials are not liable for actions of subordinates on
4 any theory of vicarious liability." *Snow v. McDaniel*, 681 F.3d 978, 989 (9th Cir. 2012) (en
5 banc) (quoting *Hansen v. Black*, 885 F.2d 642, 645-46 (9th Cir. 1989)). "A supervisor may be
6 liable only if (1) he or she is personally involved in the constitutional deprivation, or (2) there is
7 'a sufficient causal connection between the supervisor's wrongful conduct and the constitutional
8 violation.'" *Id.* (quoting *Hansen*, 885 F.2d at 646).

9 The causal connection can include: "1) [the supervisor's] own culpable action or inaction
10 in the training, supervision, or control of subordinates; 2) their acquiescence in the constitutional
11 deprivation of which a complaint is made; or 3) conduct that showed a reckless or callous
12 indifference to the rights of others." *Lemire v. Cal. Dep't of Corr.*, 726 F.3d 1062, 1085 (9th Cir.
13 2013) (citations and internal quotation marks omitted). "The requisite causal connection can be
14 established by setting in motion a series of acts by others, or by knowingly refusing to terminate
15 a series of acts by others, which the supervisor knew or should have known would cause others
16 to inflict a constitutional injury." *Id.* (citing *Starr v. Baca*, 652 F.3d 1202, 1207-08 (9th Cir.
17 2011), *cert. denied*, 132 S.Ct. 2101 (Apr. 30, 2012)) (internal quotation marks omitted).

18 In addition, "[s]upervisory liability exists even without overt personal participation in the
19 offensive act if supervisory officials implement a policy so deficient that the policy 'itself is a
20 repudiation of constitutional rights' and is 'the moving force of a constitutional violation.'" *Crowley v. Bannister*, 734 F.3d 967, 977 (9th Cir. 2013) (quoting *Hansen*, 885 F.2d at 646)
21 (internal quotation marks omitted). This is the type of claim Plaintiff seeks to bring against these
22 government official defendants.
23

1 Causation is essential to this type of claim. *See Crowley*, 734 F.3d at 977 (citing *OSU*
2 *Student Alliance v. Ray*, 699 F.3d 1053, 1076 (9th Cir. 2012), *cert. denied*, No. 12-1296, 2013
3 WL 1808554 (Oct. 7, 2013)). In *OSU Student Alliance*, the Ninth Circuit stated: "Advancing a
4 policy that requires subordinates to commit constitutional violations is always enough for § 1983
5 liability...so long as the policy proximately causes the harm—that is, so long as the plaintiff's
6 constitutional injury in fact occurs pursuant to the policy." *OSU*, 699 F.3d at 1076 (emphasis
7 added). The Ninth Circuit expressly agreed with the Tenth Circuit, which held: "§ 1983 allows a
8 plaintiff to impose liability upon a defendant-supervisor who creates, promulgates, implements,
9 or in some other way possesses responsibility for the continued operation of a policy the
10 enforcement (by the defendant-supervisor of her subordinates) of which 'subjects, or causes to be
11 subject' that plaintiff 'to the deprivation of any rights...secured by the Constitution...'" *OSU*, 699
12 F.3d at 1076 (quoting *Dodds v. Richardson*, 614 F.3d 1185, 1199 (10th Cir. 2010)).

13 Here, Plaintiff contends that there was a policy, practice or custom of allowing prisoners
14 to be charged and convicted of murder violations despite no one having been killed, and that was
15 promulgated, permitted and/or enforced by these Defendants and this was the driving force
16 behind Plaintiff being convicted and sanctioned for murder even though no one had died as
17 alleged in the seventh cause of action, and this was the force behind him being placed in
18 confinement under the conditions discussed in his eighth cause of action.

19 AR 707 is the alleged policy. AR 707 governs NDOC's inmate disciplinary process.
20 (ECF Nos. 20-2, 20-3.) Inmates within NDOC are subject to disciplinary action for violations of
21 rules and regulations. (ECF Nos. 20-2 at 2, 20-3 at 2.) AR 707 lists NDOC's disciplinary
22 offenses. At the outset, the regulation states that the offenses listed in AR 707.02.3 through
23 707.02.6 "also include an attempt or conspiracy to commit that violation." (ECF Nos. 20-2 at 3,

20-3 at 6, AR 707.02.1, emphasis added.) AR 707.02.5 lists the "Major Violations." Included within the Major Violations is MJ 16, which is the disciplinary offense for murder. AR 707 defines murder as: "The unlawful killing of another human being with malice aforethought, either express or implied, *and all lesser included offenses*." (ECF Nos. 20-2 at 7, 20-3 at 9, emphasis added.) Therefore, contrary to Plaintiff's argument, reading the AR as a whole, it does appear to define what is meant by "lesser included offenses"—attempt and conspiracy.

Plaintiff argues that he was not charged with attempted murder or conspiracy to commit murder, but he was charged and convicted of murder. That does not mean that the regulation, as adopted and maintained by the Board Members, did not allow for the charge of attempted murder or conspiracy to commit murder. It cannot be said that the Board Members promulgated or maintained a policy allowing prisoners to be charged, convicted and sanctioned for murder when no one died, because the regulation includes the violations of attempt and conspiracy, and such offenses necessarily mean that the victim did not die. The decision regarding how to specifically charge Plaintiff was made by officials within NDOC involved in the disciplinary process, and not by the Board Members. Under these circumstances, the court finds that the Board Members did not *cause* Plaintiff's constitutional violation: charging and convicting him of murder despite the fact that no one died.

Plaintiff also argues that MJ-16 contains a mens rea element of malice aforethought, either express or implied, but he contends that the policy allows prisoners to be charged and convicted of murder without producing some evidence of malice aforethought or intent to kill.

Again, the murder charge also encompasses attempt and conspiracy offenses. In criminal law, typically, to commit attempt, there must be an intent to commit a particular crime. Murder may be committed without an intent to kill, but attempt to commit murder requires a specific

1 intent to kill. *Braxton v. United States*, 500 U.S. 344 (1991); *see also* Nev. Rev. Stat. 193.330(1)
2 ("An act [is] done with the intent to commit a crime, but tend[s] but fail[s] to accomplish it[.]");
3 *Keys v. State*, 766 P.2d 270, 104 Nev. 736 (1988) ("[T]he performance of an act which tends, but
4 fails, to kill a human being, when such acts are done with ... the deliberate intention unlawfully
5 to kill.").

6 A conspiracy occurs when one or more people agree to commit a crime. *Nunnery v.*
7 *Eighth Judicial District Court*, 186 P.3d 886, 124 Nev. 477 (2008). Typically, the person being
8 charged must have: (1) the intent required to commit the crime contemplated; and (2) the intent
9 to act together in carrying out the agreed upon crime. *See* 4 Wharton's Criminal Law § 680 (15th
10 ed.).

11 Contrary to Plaintiff's assertion, murder as it defined in MJ 16, as well as the offenses of
12 attempted murder and conspiracy to commit murder, would require evidence of intent to kill. If
13 the victim did not die, and there was no proof of intent to kill, presumably an inmate would be
14 charged with a lesser crime such as battery (MJ3) ("any willful use of force or violence upon the
15 person of another"), or manslaughter (MJ14), which is specifically defined in AR 707 as: "The
16 unlawful killing of another human being *without malice either express or implied*. It may be
17 either voluntarily, in the heat of passion, or involuntarily." (*See* ECF No. 20-2 at 5-6, emphasis
18 added.) Whether there was the requisite amount of evidence to convict Plaintiff (*i.e.*, whether he
19 had the requisite mental state), or whether he was even charged with the correct crime, was up to
20 the disciplinary hearing officer and those assigned to review his appeals, not the Board Members.

1 Therefore, the moving Defendants should be granted summary judgment with respect to
2 the seventh cause of action.²

3 With respect to the eighth cause of action, there is no evidence in the record that
4 Plaintiff's designation as HRP status or his placement in confinement under the conditions
5 alleged had any relationship to the Board Members approval of AR 707. Instead, Plaintiff alleges
6 that defendant Filson placed him on HRP status and he was put in the suicide-watch type cell
7 under atypical conditions. The court finds that the connection Plaintiff attempts to make between
8 these Defendants' adoption, promulgation and maintenance of AR 707, which defines the
9 disciplinary charge of murder within NDOC, and his placement on HRP status subject to the
10 alleged unconstitutional conditions, is much too tenuous. In other words, the court does not find
11 that the adoption or maintenance of this AR *caused* Plaintiff to be subject to the conditions he
12 found himself housed in after he was charged with murder. Therefore, summary judgment should
13 be granted in these Defendants' favor with respect to the eighth cause of action.

14 Plaintiff also brings these causes of action under the corollary provisions of the Nevada
15 Constitution for due process and the prohibition against cruel and unusual punishment.

16 Defendants argue for the first time in their reply that they are entitled to summary
17 judgment because there is no private cause of action based on Article 1, Section 8 of the Nevada
18 Constitution (Nevada's Due Process Clause). (ECF No. 23 at 11-12.) They argue that the Nevada
19 Supreme Court has not recognized a common law right of action under the Nevada Constitution's
20
21

22 ² The court does not address at this time whether Plaintiff's charge for murder could in fact be
23 construed as a charge for a lesser offense of attempt or conspiracy even the disciplinary charge
and conviction only refers to murder, whether Plaintiff was charged with the correct crime
(whether there was sufficient evidence to support the conviction), as those arguments are
properly raised by the defendants involved in the disciplinary process.

1 mandate of due process, and has only addressed due process claims when property or liberty
2 interests are at stake.

3 Both "[t]he United States and Nevada Constitutions provide that no person shall be
4 deprived of liberty without due process of law." *Scarbo v. Dist. Ct.*, 206 P.3d 975, 979 (2009),
5 125 Nev. 118, 124 (2009); Nev. Const. art. 1, § 8. Those due process protections apply "when
6 government action deprives a person of liberty or property." *State ex rel. Bd. of Parole Com'rs v.*
7 *Morrow*, 255 P.3d 224, 227, 127 Nev. 265, 271 (2011) (citation and quotation marks omitted).
8 Defendants overlook the fact that Plaintiff is asserting a violation of a liberty interest.

9 They also argue in their reply that Nevada does not provide a private right of action
10 Article 1, Section 6 of the Nevada Constitution (the prohibition against cruel and unusual
11 punishment), and that Nevada only recognizes such claims in the context of criminal sentencing.
12 (ECF No. 23 at 12-13.) While the cases under Nevada's cruel and unusual punishment clause do
13 seem to arise in connection with sentencing, there does not seem to be authority that an inmate
14 cannot argue a conditions of confinement claim under Nevada's Constitution.

15 Nevada courts have noted the similarity between the federal and state constitutions, and
16 frequently look to federal precedent to guide their analysis. *See e.g. Hernandez v. Bennett-*
17 *Haron*, 287 P.3d 305, 310, 128 Nev. 580, 587 (2012) (citation omitted). Therefore, as with the
18 United States Constitution, in order to violate these provisions of the Nevada Constitution, one
19 would have had to personally participate in the violation. For the reasons discussed above, these
20 Defendants are entitled to summary judgment on the corollary Nevada Constitution claims
21 asserted against them in the seventh and eighth causes of action.

22 As a result of these findings, the court need not reach Defendants' remaining arguments,
23 and the moving Defendants' motion for summary judgment should be granted.

1 **IV. RECOMMENDATION**


2 IT IS HEREBY RECOMMENDED that the District Judge enter an order **GRANTING**
3 the Motion for Summary Judgment (ECF No. 20) filed by certain defendants to this
4 action—former Governor Sandoval, former Attorney General Laxalt, Secretary of State
5 Cegavske, Governor Sisolak and Attorney General Ford—for the reasons stated herein.

6 The parties should be aware of the following:

7 1. That they may file, pursuant to 28 U.S.C. § 636(b)(1)(C), specific written objections to
8 this Report and Recommendation within fourteen days of being served with a copy of the
9 Report and Recommendation. These objections should be titled “Objections to Magistrate
10 Judge’s Report and Recommendation” and should be accompanied by points and
11 authorities for consideration by the district judge.

12 2. That this Report and Recommendation is not an appealable order and that any notice of
13 appeal pursuant to Rule 4(a)(1) of the Federal Rules of Appellate Procedure should not be
14 filed until entry of judgment by the district court.

15
16 Dated: May 11, 2020

17 
18 William G. Cobb
19 United States Magistrate Judge
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21
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23